Civil No. 20617

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD,
Appellant,

vs.

WILLIAM J. McGUINESS,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

J F. COAKLEY,
District Attorney of the County of Alameda, State of California

RICHARD J. MOORE,
Assistant District Attorney

THOMAS J. FENNONE,
Deputy District Attorney
Attorneys for Appellee

900 Court House
Oakland 12, California

INTER-CITY PRINTING COMPANY, OAKLAND 7, CALIFORNIA

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Codes

Texts

Civil No. 20617

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD,

Appellant,

vs.

WILLIAM J. McGUINESS,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Pursuant to 28 U.S.C.A., Section 1331, 28 U.S.C.A., Rule 18, 9th Circuit, this reply to Appellant's Opening Brief is hereby filed before this Honorable Court.

FACTS OF THE CASE

The Appellee herein feels that the statement of the facts in this case as contained in the Appellant's Opening Brief (pages 1-3) fails to give a complete background of the case at bar, and, for that reason, the Appellee believes that the following exposition would be of assistance to this Honorable Court:

In 1961, the Appellant's wife filed an action for divorce in the Superior Court of the State of California in and for the County of Alameda. Both parties to the action were domiciled in Alameda County at the time. The Appellant was duly served in Alameda County, answered the complaint, and appeared in his own behalf at the subsequent trial.

Some six months after the initiation of this divorce action, the Appellant filed a petition for a Creditors' Arrangement in the Federal Bankruptcy Court without informing that court of the pending divorce action; this Arrangement was later set aside by the United States District Court. The Appellant did not inform the Alameda County Superior Court of this action until such time as that court, at the conclusion of the divorce trial, awarded custody of the children and of the family dwelling to the Appellant's wife. The Appellant then sought to allege that the court lacked jurisdiction to so award the house since at the moment he filed his petition for the Creditors' Arrangement the Superior Court was "automatically" divested of all jurisdiction—without his applying for a stay of proceedings, without notice of any kind to the Superior Court, and, as it developed, without any merit to the contention.

The Appellant then appealed the divorce to the California District Court of Appeals. That Court's opinion in the case is attached hereto as Appendix "A." That Court resolved the question of jurisdiction firmly against the Appellant.

Subsequently, the Appellant's former wife applied to the Alameda County Superior Court for a Show Cause Order to exclude the Appellant from the family dwelling, which he refused to leave. Judge Bostick of the Alameda County Bench signed the Order and found the Appellant in contempt of Court after a hearing and confined him to the County Jail. Thereafter, the Appellant filed an action in the United States District Court seeking money damages against Judge Bostick, claiming that the Judge had acted in the absence of all jurisdiction. The District Court sustained the Judge's motion to dismiss.

The Appellant then appealed that decision to this Honorable Court, which agreed with the California District Court of Appeals' decision on the subject of jurisdiction in an opinion which is attached hereto as Appendix "B." Later, the United States Supreme Court refused to grant the Appellant's Petition for Writ of Certiorari in that matter, after this Court had denied his Petition for a Rehearing.

In 1964, the Appellant's former wife was once again compelled to seek redress from the Alameda County Superior Court as a result of the Appellant's continued refusal to obey that Court's orders which it validly made as an incident to the entry of its final divorce decree. The Appellee herein signed an Order to Show Cause directing the Appellant's appearance on a date certain. Upon his failure to appear, a body attachment was issued, and the Appellant was again jailed after being found in contempt of Court.

Following his release, the Appellant filed this action against the Appellee, again seeking money damages in the United States District Court. The Appellee filed a Motion to Dismiss, which was granted on October 11, 1965. This appeal followed.

SUMMARY OF ARGUMENT

Both this Honorable Court and the California District Court of Appeals have held that the Alameda County Superior Court has had and presently continues to have proper jurisdiction to enforce its decrees in the case of Arnold vs. Arnold, which jurisdiction was not interrupted by the Appellant filing a petition for a Creditors' Arrangement in Bankruptcy nor "suspended" by his filing of a Motion to Quash the Order to Show Cause issued by the Appellee against the Appellant.

Judges are immune to liability for damages in civil actions even for their erroneous acts and the Motion to Dismiss is the proper remedy in Federal Courts to be applied to complaints seeking such damages from judicial officers.

ARGUMENT

I.

THE SUPERIOR COURT'S CONTINUING JURISDICTION OVER THE CASE BEFORE IT WAS NOT AFFECTED BY THE APPELLANT'S ACTION.

In the present case, the Appellant once again seeks to strip the Alameda County Superior Court of jurisdiction and, at the same time, hold a duly qualified

udge thereof liable in a civil action for money dam-
ges.

Paragraphs II, III, and X of the Complaint on file
erein allege a "status" for the Appellant as a "debtor
n possession" of certain property which the Alameda
ounty Superior Court awarded to Mrs. Arnold upon
he granting of a divorce to the Appellant's former
vife.

Despite the California District Court of Appeals'
nd this Honorable Court's decisions to the contrary
see Appendices "A" and "B"), the Appellant still
naintains that the Alameda County Superior Court
acks and has lacked jurisdiction. As a result, the
ppellant contends that the shield of judicial im-
nunity is to be stricken from the Appellee and that
e is to answer the Complaint on file.

Quite simply, this Honorable Court has decided
hat the mere act of filing a petition for Creditors'
rrangement in and of itself did not deprive the Ala-
neda County Superior Court of jurisdiction in this
ase. (*Arnold* vs. *Bostick*, 339 Fed. 2d 879; Appendix
'B.") The Appellant's Petition for Writ of Certiorari
o the United States Supreme Court was denied at 382
J.S. 858 and the opinion of this Honorable Court
tands in the Federal judicial system as dispositive of
he jurisdictional issue involved.

And still the Appellant persists.

He prefers to ignore not only the settled issue of
urisdiction by seeking to raise its emaciated specter

again in this action, but he also ignores whatever other possible remedies he may have under the laws of the State of California to have his contempt commitment reviewed at an appellate level.

He desires only money damages from a Judge of the Superior Court.

He admits in paragraphs V and VI of his Complaint that he was served on July 15, 1964, with an Order to Show Cause in re Contempt which was set for hearing on July 28, 1964. He also admits therein that he ignored that order, which, to his way of thinking, was apparently no longer valid since he had filed a Motion to Quash under Section 416.1 of the California Code of Civil Procedure.

It is quite elementary that under Section 139 of the Civil Code of the State of California "in a divorce action, the court has *continuing* jurisdiction . . . insofar as alimony or support payments for the wife are concerned." (Emphasis added.) (*Duque* vs. *Duque*, 155 Cal. App. 2d 142, 144.) This means that as applied to this case, the Superior Court of Alameda County acquired jurisdiction over both parties to the divorce action of Arnold vs. Arnold when the Plaintiff filed her Complaint and it was served upon the Appellant and he filed his Answer thereto. Obviously, as this Honorable Court has stated, this jurisdiction remained uninterrupted by the Appellant's scheme of filing a petition for a Creditors' Arrangement in Bankruptcy. Once the Appellant submitted himself in 1961 to the Jurisdiction of the Superior Court, that jurisdiction

to enforce its orders against him continued ". . . for all the subsequent proceedings." (Code of Civil Procedure, Section 416.)

If the Appellant seeks to resist valid orders of the Superior Court, he must expect to run the risk of being found in contempt. If he seeks relief from what he considers harsh or unjust alimony and/or child support payments, he has a remedy available to him other than an attempt of this sort to seek damages from a Superior Court Judge:

> "Certainly, it cannot be disputed that 'the trial court entering the decree still retains jurisdiction to modify its orders if circumstances warrant the change, and the proper procedure for a party who is unable to comply with an order for the payment of alimony or the support of his minor children is to seek a modification of the order—not to resist its enforcement, thereby subjecting himself to contempt proceedings'." *Bratnober* vs. *Bratnober*, 48 Cal. 2d 259, 263; See also: *Bailey* vs. *Superior Court*, 215 Cal. 548; *Woolams* vs. *Woolams*, 115 Cal. App. 2d 1.

There is no allegation in the Complaint on file herein that the Appellant chose to seek a modification of the order to pay One Dollar ($1.00) per year alimony to his wife and Fifty Dollars ($50.00) per month child support for each of his children, which award the District Court of Appeals found to be quite fair in view of the Appellant's education, training, and earning capacity. (See Appendix "A," page 25.)

However, the Appellant sought to "suspend" the Court's jurisdiction by filing a Motion to Quash under Section 416.1 of the Code of Civil Procedure.

This section of the Code was enacted in 1955 to allow a defendant who had been served with a summons in an action to contest the court's jurisdiction without subjecting himself to that jurisdiction by a finding that he made, in effect, a "general" or "special" appearance.

This section follows Section 416 of the Code which states that the court is deemed to acquire jurisdiction of the parties upon service of summons and complaint. Both these sections are part of Title V of Part 2 of the Code of Civil Procedure, entitled "Manner of Commencing Civil Actions." The Motion to Quash provides a remedy available at the *start* of a civil action, not during the course of one after the defendant submits himself to the court's jurisdiction. In short, the Superior Court already *had* jurisdiction, and this issue was settled at two separate appellate levels.

As the Supreme Court of California puts it:

> "The obvious purpose of sections 416.1 and 416.3 is to permit a defendant to challenge the jurisdiction of the court over his person without waiving his right to defend on the merits by permitting the default to be entered against him *while the jurisdictional issue is being determined.*" (Emphasis added.)

Hartford vs. *Superior Court*, 47 Cal. 2d 447, 452.

Here the jurisdictional issue had been previously etermined. The Appellee knew this from the contents f the file before him which contained a copy of the)istrict Court of Appeals' decision in the case of *rnold* vs. *Arnold* (Appendix "A"). Needless to say, ıe Appellant also knew it, although he may still have efused to believe it.

In a proper situation in which the services of Sec- ion 416.1 are utilized, there is no "suspension" of ırisdiction, since the clear intent of the statute is to etermine whether or not jurisdiction properly exists rior to the time in which the defendant should plead) the complaint on file against him. However, once he les his answer or other pleading, he has submitted imself to the court's jurisdiction as Section 416 points ut. He can no longer seek to quash the summons. The ppellant herein already had submitted himself to the uperior Court's jurisdiction when he filed his Answer) the divorce action initiated in 1961, which jurisdic- ion was continuous and uninterrupted throughout all hases of the case from the time of his Answer to the resent.

II.

THE APPELLEE PROPERLY ACTED IN THE MATTER BEFORE HIM, ESPECIALLY IN LIGHT OF THE SETTLED JURISDICTIONAL ISSUE AND IS NOT LIABLE EVEN IF HIS ACTION WAS ERRONEOUS.

If this Honorable Court were to assume that the Appellant's contentions are correct in that his filing of a Motion to Quash "suspended" the jurisdiction of the Alameda County Superior Court, then he still could not maintain this action. As the Appellant himself points out (Appellant's Opening Brief, Page 5) and as the law states:

> "When a judicial officer does an act in the *clear* absence of *all* jurisdiction and *knows* of the absence of such jurisdiction, his judicial immunity is pierced, but when he merely acts in excess of vested jurisdiction, the general immunity of a judicial officer remains intact . . ." (Emphasis added.)

Johnson v. *MacCoy*, 278 Fed. 2d 37;

See also:

Bradley v. *Fisher*, 80 U.S. 335;

Randall v. *Brigham*, 74 U.S. 523;

Barr v. *Matteo*, 360 U.S. 569;

White v. *Towers*, 37 Cal. 2d 727;

Hardy v. *Vial*, 48 Cal. 2d 577.

Where is the "clear" absence of "all" jurisdiction "known" by the Appellee in this case? At the very most, if all jurisdiction were lacking here, the Appellee's act was an erroneous one in believing that his court still retained jurisdiction of the matter, for which erroneous act there is no civil liability, as the Appellant himself concedes (Appellant's Opening Brief, Page 5).

On the contrary, the Appellee at the time he found the Appellant in contempt had before him the civil file of Arnold v. Arnold, which file contained an opinion from the District Court of Appeals for the State of California (See Appendix "A") which clearly settled the jurisdictional question against the Appellant. As far as the Appellee, or any other judicial officer similarly situated, did know or could know, there was no unresolved or even doubtful question of jurisdiction in the matter before him. The Appellee had validly issued his Order to Show Cause which was duly served on the Appellant. That order directed the Appellant to appear in court at a time and date certain and at *that* time "show cause" why he should not be found in contempt. The Appellant chose to ignore that order. Certainly, he could have appeared at that time and stated whatever objections he had, be they of a general, jurisdictional, or procedural nature.

There is no issue raised herein of the power of the court to punish by contempt those who disobey ". . . any lawful judgment, order, or process of the court." (Code of Civil Procedure, Section 1209 [5]). Nor is there any doubt that the penalty for failure to obey a show cause order is imprisonment:

> "Petition for Writ of Habeas Corpus. It appears from the record that petitioner is held by the sheriff of the City and County of San Francisco under an order of arrest issued out of the Superior Court for failure to obey an order duly served upon him requiring that he appear and show cause why he should not be punished for failure to obey a previous order with reference to the payment of alimony. The court had full authority to make the order in question.
>
> The petition is denied."
>
> *In re Grigoris*, 98 Cal. App. 337, 338.

As far as the Appellee could see, his validity issued order had been disobeyed; hence, the Appellant was jailed. Whether the complaining affidavit leading to the issuance of the show cause order was defective or not was a question to be determined on the date set for hearing of the order; the Appellee was quite justified in issuing his order under Section 1211 of the Code of Civil Procedure:

> "When the contempt is not committed in the immediate view and presence of the court . . . an affidavit shall be presented to the court or judge of the facts constituting the contempt . . ."

Here, assuming that the Appellant refused to pay the child support and/or alimony which the Court had ordered him to pay, which order the Appellate Court had affirmed, the person to whom this duty was owing could and did swear out an affidavit informing the

Court that there was probable cause that a contempt of the Court's directions had been committed. Were the Appellee to ignore the request or attempt to decide on his own whether or not the affidavit was defective in some manner, he would be guilty of a serious breach of ethical conduct at the very least. His issuance of the Show Cause Order in response to the affidavit served to notify the Appellant that complaint had been made of his conduct in the matter at hand and that he (the Appellant) would have an opportunity at the time and date specified in the order to present his side of the controversy, and, if he chose, to attack the sufficiency of the affidavit.

Instead, the Appellant chose to ignore the Court's directive, and now seeks to have the Appellee answer a Complaint for money damages for acting in the manner which the law demanded of him.

And yet, even if the Appellant had been jailed for contempt when the basis for issuing the Order to Show Cause was founded upon a faulty affidavit which somehow served to divest the Appellee of jurisdiction, it is still clear that the judicial action taken against the Appellant was at most the result of an error on the Appellee's part, which does not render him liable to an action for damages.

Unless the Appellant's purpose in filing his Motion to Quash was to obstruct the lawful process of the Superior Court in seeking to enforce its orders and decrees, the only plausible reason for the Appellant's action would be to attempt to raise the issue of juris-

diction once more in this fashion. That issue is firmly settled. Whatever other possible motive lay behind the Appellant's filing of this motion is not revealed by the record.

It is quite clear in such a case that the Motion to Dismiss is the proper remedy to be applied to such a complaint.

Arnold v. *Bostick*, 339 Fed. 2d 879;

Rudnicki v. *McCormack*, 210 Fed. Supp. 905;

Blumenthal v. *Girard Trust Co.*, 141 Fed. 2d 849;

Braugh v. *Birmingham*, 49 Fed. Supp. 229;

Tahir Erk v. *Glen L. Martin Co.*, 116 Fed. 2d 865.

III.

THIS HONORABLE COURT IS CONFINED TO THE RECORD ON APPEAL AND SHOULD NOT CONSIDER SUBSEQUENT ACTIONS COMPLAINED OF BY THE APPELLANT.

The Appellant attempts throughout his Opening Brief to introduce new matter into the record on file herein relating to another Show Cause Order granted by the Appellee after this case at bar had been dismissed in the District Court. It is elementary that this cannot be allowed:

"It is a general rule . . . that an appellate court can consider nothing that is not contained in the record, and will decide the case and the questions raised only on the basis of the record presented."

4A C.J.S., Sec. 1206, Pg. 1329.

See also: *Congress Spring Co.* v. *Knowlton*, 103 U.S. 49,

And cases cited at 4A C.J.S., Sec. 1206, Pg. 1329.

Undoubtedly the Appellant wishes to demonstrate that the Appellee committed a "void" act in this case, as opposed to what is at most an erroneous act—a possibility that seemingly does not occur to the Appellant—since the later Show Cause Order was dismissed due to a defect in the supporting affidavit. Perhaps it would be desirable for this Honorable Court to decide this later action at this time if it could and to do so properly in favor of the Appellee so as to spare him the indignity of another action in the United States District Court at a future date by this Appellant; however, as is manifest, this Honorable Court's deliberations must be confined to the record before it and to the facts constituting the cause of action contained in the Complaint on file.

For these and the foregoing arguments, it is respectfully submitted that the Motion to Dismiss this action granted by Judge Harris was proper and it should be sustained by this Honorable Court.

Dated: May 24, 1966.

J. F. COAKLEY
District Attorney of the County of Alameda, State of California

RICHARD J. MOORE
Assistant District Attorney

THOMAS J. FENNONE
Deputy District Attorney

Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS J. FENNONE
Attorney for Appellee

APPENDIX

APPENDIX "A"

N THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

1 Civil No. 21272 — 1 Civil No. 21298

'RANCES KELLY ARNOLD,
Plaintiff and Respondent,
vs.
. HOWARD ARNOLD,
Defendant and Appellant.

Defendant J. Howard Arnold appeals in propria ersona from an interlocutory decree of divorce, and rom an order temporarily excluding him from the amily dwelling.

On November 29, 1961, plaintiff Frances Kelly rnold filed her complaint for divorce upon the ground f extreme cruelty. She sought custody of the parties' our minor children, alimony, child support, and all f the community property. Defendant's answer denied xtreme cruelty to plaintiff and prayed that a divorce e denied on the grounds of condonation and recrimi- ation.

Appellant must remember that where there is a onflict in the evidence, a finding by the trial court ased thereon is binding on the appellate court.

We are satisfied from our reading of the record that the evidence produced on behalf of plaintiff amply supports the trial court's findings that during the past seven years defendant had wilfully inflicted upon plaintiff a course of great and grevious mental pain and suffering without any cause or provocation on the part of plaintiff; that plaintiff was a fit and proper person to have the care, custody and control of the minor children; that the community property consisted solely of the family home and that plaintiff should be awarded the home to better enable her to support herself and the children; that plaintiff did not condone the extreme cruelty inflicted upon her by defendant; that plaintiff did not wrongfully inflict mental pain and suffering upon defendant; that defendant was not a good and faithful husband to plaintiff; and that there was no connivance, collusion or recrimination on the part of plaintiff toward defendant.

On October 23, 1962, the court awarded plaintiff an interlocutory decree of divorce on the ground of extreme mental cruelty and further awarded her custody of the minor children, alimony in the amount of $1 per year, child support in the amount of $50 per month for each of the three youngest children, attorney's fees, and the family home together with the immediate and exclusive possession thereof.

On January 24, 1963, plaintiff obtained an order to show cause why defendant should not be excluded from the family dwelling. In her supporting affidavit, plaintiff averred that defendant had continued to remain in and about the family home subsequent to the entry of the interlocutory decree; that defendant had

failed to obtain any type of employment and had paid nothing on account of child support or attorney's fees; that on June 19, 1962, defendant had surreptitiously filed an application for an arrangement with his creditors, all of whom were his close relatives, in federal district court, and had thereby sought and still seeks to place a $16,000 second deed of trust in favor of these creditors upon the house; that the atmosphere in the house had become intolerable to plaintiff and the children, and there was danger of one or more members of the family being forced into physical violence with defendant; that defendant had created a fire hazard by maintaining piles of newspapers and other records in the basement where he was currently camping; that plaintiff had been compelled to padlock the refrigerator in order to guard the meager necessities of life from defendant; that plaintiff had barely enough funds to support her family due to defendant's failure to contribute any sum toward house payments, taxes, or the support of the children; that unless defendant were to be ousted from the premises, plaintiff and her minor children would be forced to seek other living quarters at a higher rental than she could afford; that if defendant were forced to move from the house, he might be more inclined to seek gainful employment.

Defendant filed an answer, alleging that the superior court lacked jurisdiction over the house by reason of his having initiated proceedings in federal district court to obtain a creditors' arrangement. He also alleged that he was without the necessary funds to secure other living quarters and to move his "extensive library."

On February 15, 1963, after a hearing, the court ordered defendant to remove himself from the family home not later than 8 p.m. on the same day and to remain excluded from said premises until further order of the court.

Turning first to the issues raised by the appeal from the interlocutory decree of divorce, it is appellant's contention that the trial court erred in finding that respondent was acting in good faith when she instituted the present divorce action. Appellant asserts that respondent was suffering from a "psychological disorder" and that her mind was "in the grip of the demon menopause." It suffices to say that the record contains no support for these charges other than appellant's uncorroborated and highly theoretical testimony. The trial court was clearly entitled to accord it little or no weight.

Appellant next contends that the evidence does not support a finding that he wilfully inflicted grievous mental suffering upon respondent. This contention is frivolous and merits no discussion.

Appellant next contends that the trial court erred in awarding respondent a divorce without finding that appellant's acts were "wrongful." Such a finding is implicit in the finding that "defendant has wilfully inflicted upon plaintiff a course of great and grievous mental pain and suffering without any cause or provocation on the part of plaintiff."

Appellant also contends that the court erred in granting a divorce without any corroboration of ex

reme cruelty. It is settled that the principal purpose f the corroboration requirement is to prevent collu- ion and that where it is clear from the evidence that here is none, only slight additional proof is necessary. Benam v. Benam (1960) 178 Cal. App. 2d 837, 842.) Here, the divorce was vigorously contested and the estimony of respondent's witness, Marjorie Mifflin, nd of the two minor children, clearly provided suffi- ient corroboration.

Appellant next contends that respondent had al- owed such an unreasonable length of time to elapse etween the commencement of appellant's alleged ruelty and the filing of the divorce complaint that onnivance, provocation and condonation were estab- ished as a matter of law. This position is untenable. Respondent's delay in commencing the present action as no bearing whatever on the question of whether r not she was guilty of provocation. Although an nreasonable delay in bringing suit for divorce does reate a presumption of connivance or condonation Civ. Code, § 125), this presumption is a rebuttable ne (Civ. Code, § 126). In the instant case, the uncon- radicted evidence established that from 1949 on, the amily was able to subsist only by exhausting all of espondent's earnings and by supplementing such in- ome with loans obtained from relatives. Under such ircumstances, respondent's delay in commencing the nstant proceedings was clearly excusable. (Washing- on v. Washington (1949) 91 Cal. App. 2d 811.)

Appellant also asserts, however, that his own testi- ony established that in September, 1961, respondent

had expressly agreed to condone his prior conduct in return for his promise to paint the exterior of the house. Appellant overlooks the fact that respondent denied any such agreement and testified only that appellant had undertaken some painting work at that time.

Appellant next contends that the court abused its discretion in finding that there had been no recrimination in bar of the divorce. Here again, appellant relies upon his own unsubstantiated testimony and also upon the fact that respondent's complaint contained an allegation of physical cruelty which she subsequently admitted to be untrue. Upon being questioned in regard to this particular allegation of the complaint, respondent indicated that she was confused as to the distinction between physical and mental suffering. Although she readily admitted that appellant had never actually struck her, she stated that appellant's acts had caused her to undergo such great mental tension as to involve physical pain. Under such circumstances, the court was clearly justified in concluding that respondent's act of signing the complaint did not amount to recrimination. It is settled that a court is not required to deny a divorce merely because both parties are at fault. (Hendricks v. Hendricks (1954) 125 Cal. App. 2d 239, 241-242.) Even where both parties demonstrate grounds for divorce, the trial court may award a divorce solely to the party less at fault. (Santens v. Santens (1960) 180 Cal. App. 2d 809, 819.)

Appellant's next contention is that the trial court erred in arbitrarily excluding important testimony on

aterial issues. The record reveals that the trial court llowed appellant great latitude in examining respondnt. Contrary to appellant's assertion, the court did ermit him to ask numerous questions bearing upon espondent's physical and mental symptoms during enopause and the medical treatment which she reeived for her condition; also, that he was allowed to uestion plaintiff about events occurring immediately rior to the filing of this action. Objections were susained only as to questions which were argumentative r which assumed facts not in evidence. Although the ourt did sustain an objection to appellant's question hether certain funds had been left jointly to respondnt and her mother, the court subsequently reversed s ruling and asked respondent whether she had any

state or property of any kind which she had not previusly mentioned. Respondent stated that she had none.

Appellant next contends that the court interfered ith the presentation of his defense and thereby proioted "extrinsic fraud" by (1) denying appellant a 0-day continuance; (2) denying appellant a statuory stay pending his suit money appeal; (3) exerting ressure against the children's testifying; (4) conluding the trial without admitting further testimony or the defense; and (5) refusing to grant appellant's equest to reopen the case.

Again the record shows that there is no merit to ppellant's contention that the court abused its disretion either in denying him a continuance or in denyng him a stay pending his suit money appeal. What ve said on May 17, 1963, in affirming the order deny-

ing appellant suit money, applies equally here. "Appellant's contention that the trial court should have stayed the proceedings until funds became available is merely a further attempt on his part to oppose the proceedings and harass the respondent and this court. We think this appeal borders on the frivolous." (Arnold v. Arnold (1963) 216 A.C.A. 354, 355.)

The various proceedings by appellant in this case clearly demonstrate that he has consistently pursued a course of conduct designed at indefinitely postponing trial of the action. Under such circumstances, appellant is in no position to contend that the trial court abused its discretion in refusing to grant a continuance at a time when the action had already been pending some ten months. It is equally apparent that appellant may not complain of the trial court's refusal to stay the divorce proceedings pending an appeal which was patently meritless and which was characterized by this court as bordering on the frivolous.

Appellant's assertion that the trial court "exerted pressure" against the children's testifying is without merit. The trial judge indicated that he wished he could discourage appellant from calling as witnesses two of his minor children, aged thirteen and sixteen. When appellant indicated that he considered their testimony important to the defense, he was permitted to examine them, which he soon abandoned when the testimony elicited from them was extremely unfavorable to him.

Appellant's contention that the trial court erred in concluding the case without hearing further testimony for the defense and in refusing to reopen the case is

aseless. At the conclusion of the case, appellant stated at the principal witness he wished to call was in Hong ong and that he was agreeable to submitting the case f he could be assured adequate time in which to present is oral argument. The case was then submitted and ppellant proceeded with his oral argument.

In the light of appellant's conduct herein, it is vident that the court correctly denied his motion to eopen the case for the purpose of producing further stimony on "all phases of the case."

Appellant next contends that the court erred in warding respondent child support without consider- ng the parties' circumstances and, in particular, ap- ellant's inability to pay. It is settled that the amount o be awarded for the care, support and education of a nild is within the discretion of the trial court. (Cronk . Cronk (1962) 210 Cal. App. 2d 683, 691; Bowman . Bowman (1957) 149 Cal. App. 2d 773, 778.) The ward of $50 per month for each minor child did not onstitute an abuse of discretion in view of the fact at appellant was a trained professional holding a octorate in chemical engineering.

Appellant also asserts that the trial court erred in warding respondent alimony and attorney's fees be- ause there was no showing of need on her part, and at the court erred in awarding custody of the minor nildren to respondent because there was no showing f her fitness. Here again, an examination of the record isclosed ample evidence in support of the court's find- gs in respect thereto.

Appellant also contends that the court erroneously awarded the community property (consisting solely of the family dwelling) to respondent without consideration of appellant's debts. It suffices to say that the record contains no evidence of appellant's debts.

Appellant's final contention on appeal from the interlocutory decree of divorce is that the court lacked jurisdiction *in rem* to make an award of the community property by reason of appellant's having commenced a proceeding in federal court to obtain a creditors' arrangement subsequent to the commencement of the divorce proceeding but prior to entry of the interlocutory decree. This argument is untenable. Appellant concedes that his petition for a creditors' arrangement was not filed in the federal district court until June 19, 1962, some six months after the filing of the divorce action. Pursuant to 11 U.S.C.A., section 714, a court having jurisdiction of such a petition may enjoin or stay proceedings pending in other courts.

Appellant did not apply for any such stay and, to the contrary, wilfully concealed from the federal court the fact that divorce proceedings were pending against him.[1] Under such circumstances, the mere filing of the petition for a creditors' arrangement was not in itself sufficient to divest the trial court of jurisdiction. In Brazil v. Azevedo (1916) 32 Cal. App. 364, 366, the court held that the mere pendency of proceedings in bankruptcy did not deprive the superior court of juris-

1. On February 28, 1963, the referee in bankruptcy in the United States District Court for the Northern District of California, Southern Division, ordered the confirmation of arrangement set aside on the ground, among others, that appellant had concealed from that court "all facts of his marriage and divorce in the Superior Court of the State of California . . . "

iction. (To the same effect, see Smith v. Phlegar 1951) 236 P. 2d 749, 753-754.)

The interlocutory decree, however, makes a present isposition of the community property. It is now settled hat such an award is improper and, where made, hould be modified by the appellate court so as to rovide that the provisions disposing of the community roperty of the parties shall be effective upon the entry f the final decree of divorce. (Brown v. Brown (1960) 77 Cal. App. 2d 387.)

The sole issue remaining is whether the trial court rred in entering its order of February 15, 1963, irecting appellant to remove himself from the family esidence not later than 8 p.m. on that day. Here again, ppellant asserts that exclusive jurisdiction over the roperty was vested in the federal court by virtue of ie filing of the petition for a creditors' arrangement. Ve have disposed of this contention.

Appellant also asserts that the court was not enti- ed to order him from the family home in the absence f a showing that respondent was in danger of suffer- ig actual physical violence at his hands. This argu- ent is untenable. Civil Code, section 157, provides iat in actions or proceedings for divorce, the court iay make orders for temporary exclusion of either arty from the family dwelling or from the dwelling f the other until the final determination of the action. his section sets forth no requirement that the party eking such an order make a showing of threatened hysical violence. (See Machado v. Machado (1962) 3 Cal. 2d 501, 507.) In view of the averments of

respondent's affidavit, which we have set forth in detai above, this order clearly did not constitute an abuse o discretion.

For the reasons above stated, the trial court is directed to modify the interlocutory decree of divorce to provide that the provisions disposing of the parties community property shall be effective upon the entry of the final decree of divorce; the interlocutory decree as so modified, is affirmed; and the order excluding appellant from the family dwelling is affirmed. Respondent to recover her costs herein.

SHOEMAKER, P. J.

WE CONCUR:

AGEE, J.

TAYLOR, J.

CERTIFICATE OF NONPUBLICATION

This opinion does not require publication in the advance sheets or official reports, under the standards provided by Rule 976, California Rules of Court.

SHOEMAKER, P. J.

AGEE, J.

TAYLOR, J.

APPENDIX "B"

HOWARD ARNOLD,
Appellant,
vs.
OBERT L. BOSTICK,
Appellee.

UNITER STATES COURT OF APPEALS
NINTH CIRCUIT

Dec. 22, 1964.

Rehearing Denied Feb. 4, 1965.

HAMLIN, Circuit Judge.

J. Howard Arnold, appellant herein, filed an action
propria persona in the United States District Court
r the Northern District of California, Southern
ivision, seeking damages against Robert L. Bostick,
ppellee herein, for alleged violation of his civil rights
nder 42 U.S.C. §§ 1981-83 and §§ 1985-86, inclusive.
he complaint and amendment thereto contained *inter*
ia the following allegations: That Robert L. Bostick
as at all times mentioned therein a duly elected,
ualified and acting judge of the Superior Court of
e State of California in and for the County of
lameda; that as such judge appellee made an order
cluding appellant from the family dwelling until
rther order of the court; that thereafter appellee
sued an order to show cause in re contempt directed
appellant for violation of such order, and following

a contempt hearing found appellant to be in contempt of court; that appellee imposed on appellant a sentence of five days in the Alameda County jail and a fine of $100 or twenty additional days in jail; that in accordance with said sentence appellant was imprisoned in the Alameda County jail for twenty-five days; and that up to the time of the filing of the complaint appellant had not regained possession of his family home.

Appellee filed a motion in the United States District Court "to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted."

[1] Both Appellant and appellee filed in the district court memoranda of points and authorities and attached to appellant's memorandum was an excerpt from the decision of the District Court of Appeal of the State of California, First Appellate District, Division Two, in the case of Frances Kelly Arnold v. J. Howard Arnold, which decision was filed February 14, 1964. From the documents on file it appears that the contempt order complained of by appellant was made in a divorce action filed by Frances Kelly Arnold against appellant in the Superior Court. It further appears that in said action the family home of Mr. and Mrs. Arnold was found to be community property and was awarded to Mrs. Arnold, together with an interlocutory decree of divorce against appellant. A contention of appellant in the divorce action and in this case was that the Superior Court lacked jurisdiction

make an award of the community property to ap-
llant's wife. On appeal to the District Court of
ppeal, the judgment of the Superior Court award-
g an interlocutory decree of divorce to appellant's
ife and awarding to her the real property of the
rties was affirmed. Concerning appellant's claim of
ck of jurisdiction the District Court of Appeal
ated:

> "Appellant's final contention on appeal from the interlocutory decree of divorce is that the court lacked jurisdiction *in rem* to make an award of the community property by reason of appellant's having commenced a proceeding in federal court to obtain a creditors' arrangement subsequent to the commencement of the divorce proceeding but prior to entry of the interlocutory decree. This argument is untenable. Appellant concedes that his petition for a creditors' arrangement was not filed in the federal district court until June 19, 1962, some six months after the filing of the divorce action. Pursuant to 11 U.S.C.A., section 714, a court having jurisdiction of such a petition may enjoin or stay proceedings pending in other courts. Appellant did not apply for any such stay and, to the contrary, wilfully concealed from the federal court the fact that divorce proceedings were pending against him. Under such circumstances, the mere filing of the petition for a creditors' arrangement was not in itself sufficient to divest the trial court of jurisdiction. In Brazil v. Azevedo (1916) 32 Cal. App. 364, 366, [162 P. 1049], the court held that the mere pendency of proceedings in

> bankruptcy did not deprive the superior court o
> jurisdiction. (To the same effect, see Smith v
> Phlegar (1951) [73 Ariz. 11] 236 P.2d 749
> 753-754.)"

We agree.

As stated in Barr v. Matteo, 360 U.S. 564 at 569
79 S.Ct. 1335 at 1338, 3 L. Ed.2d 1434,

> "This Court early held that judges of courts o
> superior or general authority are absolutel
> privileged as respects civil suits to recover fo
> actions taken by them in the exercise of thei
> judicial functions, irrespective of the motive
> with which those acts are alleged to have bee
> performed, Bradley v. Fisher, 13 Wall 335 [2
> L.Ed. 646] * * *."

[2] We hold that the above doctrine of judicia
immunity effectively precludes any recovery by appe
lant in his action for damages filed in the district cou
and that the order of the district court dismissing th
action was proper.

Judgment affirmed.